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Supreme Court of the United States

OCTOBER TERM, 1992

AMERITECH CORPORATION, *et. al.*,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et. al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF UNITED STATES TELEPHONE ASSOCIATION (A RESPONDENT UNDER RULE 12.4) IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The United States Telephone Association concurs in the list of parties contained in the Petition of Ameritech Corporation, *et. al.*

The United States Telephone Association is the principal trade association of local telephone companies. All of the regional Bell Operating Companies are members of USTA, as are more than 1,000 other local telephone companies, sometimes called independent telephone companies. The independent telephone companies together serve about 59% of the land area of the United States, but only about 18% of the population.

USTA has no parent or subsidiaries, and has no securities in the hands of the public. It is a not-for-profit corporation which is incorporated in Illinois, and has existed since 1897.

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STATEMENT OF THE CASE

The United States Telephone Association generally concurs in petitioners' statement of the case.

The Association and its members have a direct, vital interest in a technologically advanced telephone network and, hence, the rapid deployment of common control signalling (or CCS) technology. Congress likewise has legislatively declared it "shall be the *policy of the United States*" to encourage "the provision of new technologies and services to the public." 47 U.S.C. § 157(a). Moreover, Congress decreed that "[a]ny person . . . who opposes a new [communications] technology or service . . . shall have the burden to demonstrate that such [technology or service] is inconsistent with the public interest." 47 U.S.C. § 157(a)

The decision below turns that policy on its head; it completely reverses the evidentiary burden of proof established by Congress. Where, as here, the Bell Operating Companies' introduction and development of network technologies is inhibited, the adverse impact reverberates upon every telephone company, no matter how small. The network efficiencies introduced in the Bell Operating Company networks directly affect the efficiencies available in the non-sell independent telephone company networks. Consequently, the lower court's decision adversely affects many nonparties to the decree, including independent telephone companies and their millions of customers.

The decision below resulted from a motion filed by U S West (one of the seven Bell Regional Holding Companies created by the AT&T divestiture decree). U S West sought a declaratory ruling or alternatively, a waiver, so that its telephone operating companies

would not have to install signalling interfaces in each of the 27 LATAs in its region. (CA JA 441). U S West was not seeking to provide inter-LATA calls to customers (which is forbidden by the decree); rather U S west was seeking the most efficient engineering option to "set up" calls which are originated and terminated by a long distance company. Specifically, technological advances made it possible to process the call control signal separately from the call itself.[1] Processing signals on a volume basis would make introduction of such technology efficient and cost effective. U S West sought authority to install those signalling interfaces in six large LATAs, stating that "from a purely engineering standpoint, U S West requires a CCS interface in only six of its LATAs." (CA JA 455).

Had the declaratory ruling or waiver been granted (which it was not), U S West would not be required to purchase and install 46 additional processors to provide the required signalling in every LATA. (CA JA 455). U S West documented that its proposal to aggregate signalling would reduce costs, promote efficient facility use, and provide an additional incentive for small long distance carriers to expand their service in competition with established national carriers like AT&T. (CA JA 455-458).

The common channel signalling matter immediately at issue is merely illustrative of the significant prob-

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[1] Common channel signalling establishes that a call path is available, and forwards key call-related information that assists other carriers to process the call correctly. It represents the application of a CCITT (worldwide) transmission convention in the United States. See Petition at 4-5.

lems the divestiture decree restrictions create for independent telephone companies. Most local telephone companies are small, locally owned and with limited service areas (often small rural areas). The decree's unique contours drastically limit the Bell Operating Companies' ability to provide specific types of signalling for small independent telephone companies even *within* a LATA if that signalling must leave the LATA for processing and then return over the network of a Bell Operating Company. In this situation, the decree is even more restrictive for independent telephone companies than for the Bell Operating Companies themselves. (*See* Order, February 10, 1992, U.S. District Court for the District of Columbia in the ongoing decree administration context.) In short, if small independent telephone companies seek to participate in a transmission scheme based on CCS, even to offer only exchange and exchange access services, the decree restricts many to alternative choices that are less efficient and more costly.

To a very real extent, the independent telephone companies' ability to use resources efficiently depends in turn on the efficient development of signalling and related capabilities by the Bell Operating Companies. The independent telephone companies' typically-less-efficient alternative is to develop arrangements with others who are not subject to the decree's restrictions, such as other carriers, including AT&T. Some have taken steps in this regard, but networking realities limit the options. A number of carriers have concluded that the other options are entirely unavailable to them, or if technically feasible, are too costly. As a result of the decree limitations, then, handling specific types of signalling becomes more difficult than

handling the related call. If an independent telephone company continued to seek out signalling arrangements with a Bell Operating Company, the independent company's signalling "queries" may be forced into a circuitous path born not of engineering efficiency but decree compliance.

The independent telephone companies face still another problem as advances in signalling technology continue to become available. Typically, the district court has addressed signalling issues by fielding waiver requests. Consequently, if new CCS applications are created, additional waiver requests to address the networking requirements of independent telephone companies will become necessary. Since no independent telephone company was an original party to the decree, an independent cannot ask for relief itself directly from the district court. Thus, each small independent telephone company can face a legal and practical hurdle steeper than that faced by the decree's original parties.

REASONS FOR GRANTING THE PETITION

In the ten years since the decree was entered, communications technology, competition and regulation have undergone profound changes. Those changes have combined with the decree limitations on the Bell Operating Companies to undermine the public interest rather than to serve the goals of the decree and the antitrust laws. They inhibit competition and thwart the efficient provision of communications services. This case illustrates the growing problems of giving AT&T, one of the original parties to the decree, a virtual veto power over the introduction of technologies in the networks of other carriers. Not only is sustaining that veto power anticompetitive (Petitioners

Br. at 22), it violates the "policy of the United States" in that it frustrates the introduction of new technology.

Ironically, the decree today imposes virtually no restrictions on AT&T, the primary defendant in the antitrust case resulting in the decree. Indeed, while the core purpose of the decree was to divest AT&T's long distance services from the Bell Operating Companies' exchange services, AT&T is now reentering the exchange access market through, among other things, targeted large customer offerings and the purchase of a substantial ownership interest in the country's largest cellular telephone company. (*See* Petition at 14.)

While AT&T can compete against local telephone companies in an increasing array of exchange services, the decree still precludes the Bell Operating Companies from competing against AT&T. In addition to this competitive asymmetry, the decisions below have bestowed a special status on AT&T the competitor, i.e., veto privileges over proposed decree modifications, including technology deployment in the networks of the Bell Operating Companies, even those the Department of Justice finds will serve the public interest and that may help AT&T's smaller competitors. That is precisely what happened here, and will recur if the lower court's decision is allowed to stand. In this case, the Department of Justice recommended relief because it would enhance the efficient provision of services, would be pro-competitive and would benefit the public generally. (CA JA 672, 689-690.)

Nevertheless, the district court denied the waiver request and the appeals court affirmed, over dissent. The appeals court pointed out that "The proposition

that AT&T's position on a proposed line of business modification can be determinative of whether the section VIII(c) first applies has . . . been a linchpin in two of our decisions." (Petition, Appendix A at 24a.) The court then simply chose not to permit the Bell Operating Companies to raise in this case the challenge to AT&T's effective veto of any relief it opposed. (Id.)

In the appeal, the United States cautioned against an interpretation of the decree that would motivate AT&T to oppose pro-competitive decree modifications to protect itself from the very competition such modifications could promote. (*See* Petition, Appendix A at 21a.) The dissent recognizes that AT&T's "contest" to a decree modification, in the form of opposition to a motion for relief, gives an original defendant—with no institutional interest in promoting competition in markets in which it competes—the unique ability to displace the otherwise applicable standard, even over the objection of the United States. (Petition, Appendix A at 31a.) Thus, restraints that can be justified only to the extent they enhance competition are enforced as an anticompetition agreement by a "private party that (naturally) resists intrusion on its turf." (Id.)

The incentive exists for AT&T to exercise its new veto whenever its private self-interest merits it. Indeed, in every antitrust consent decree requiring divestiture, the desire of one of the successor businesses to begin to compete against another will trigger the issues raised here, if the standard of this case prevails there. And the problem will become significantly greater if more parties are initially involved in a particular divestiture case.

A central issue in today's telecommunications environment that affects both the Bell Operating Companies and the independent telephone companies exists because restraints originally designed to promote competition now, due to intervening changes, have the opposite impact. The restraints lose their meaning in markets where competition is established and other competitors operate without restraints. Those restraints continue to be exploited by competitors for anticompetitive ends. In the telecommunications business in particular, time and events have dramatically altered the landscape, reversing the impact of decree limits on the fundamental network operations implicated here, and promoting anticompetitive ends instead.

This case provides an opportunity to address directly a core antitrust concern that has occurred more often in recent years in the review of antitrust consent decrees—maintaining the procompetitive policies of the antitrust laws by providing clear support for the public interest assessment of the public's representative, the Department of Justice. In short, the issue posed by the Petition, while well-illustrated by this particular waiver request, is likely to recur in other circumstances in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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